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ABSTRACT

A review of faculty-related court decisions in the areas of status, compensation, and unit determination points out legal rights of part-time and full-time faculty in higher education. These rights have been tested and defined by many court cases. Litigation has occurred about the difference between part-time and full-time faculty. In regard to status, basic to the property contract rights of faculty is the classification of employee position. It is estimated that about 85% of part-time faculty are not eligible for tenure. The due process granted an employee may be accrued as a matter of law, policy, common practice, and/or acquiescence. Persons contemplating part-time employment should consider rights to security, type of work offered, and administrative responsibility for monitoring part-time employment. Different standards of compensation for part-timers are tolerated as long as there is a justification of differential treatment. Unit determination involves a decision about whether or not a group should be included in a collective bargaining unit. The actions of various states have led to a tightening of definitions. Efforts to include part-timers have been most successful at the community college level. Part-time faculty are often treated differently by administrators who do not want to incorporate the part-timers in tenured faculty negotiations. A review of related court cases suggests an improvement in the quality of educational codes and statuses so the relationship between the institution and its employees is more clearly understood. Contains 30 references. (SM)

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# The Legal Rights of Tenured and Part-Time Faculty Members in Higher Education

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## Abstract

The legal rights of part-time and full-time faculty in higher education have been tested and defined by a variety of court cases in the 1970s and 1980s. A review of faculty-related court decisions in the areas of status, compensation, and unit determination points out the important issues for faculty and administration, and serves as a guide for those in or planning to enter employment in higher education, whether as temporary, part-time or tenure-track employees.

As a judge stated, "Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at the university level are probably the least suited for federal court supervision" (Ludolph, 1986). Yet the protection and rules that guide personnel procedures for higher education faculties throughout the nation have undergone changes in recent years that have reflected the increased judicial involvement in the educational domain. The judicial intrusion into higher education has been seen as a threat to education's previous autonomy and has resulted in adjustments to the way schools conduct business. Part of the result, however, of these legal challenges has been the beneficial detailing of employee rights for continued future employment. This does not mean either the institution has lost its legal authority to run the school or the faculty has gained an advantage; rather, the relationship has been clarified from one of a benevolent employer and a dependent child to one of partners in an endeavor. What follows is a summary of the rights and protections of part-time and full-time employees, and a brief review of regulations that govern these areas at postsecondary institutions. The focus is on the court decisions related to the faculty, yet the guidelines apply to other personnel employed at educational institutions as well.

The postsecondary education faculty at any institution in America is diverse. Nationally, the total higher education

faculty is estimated to be 675,000, and 32% are part-time employees (American Association of University Professors Subcommittee [AAUP], 1981). Four-year schools report 26% of their staffs are part-time, and these individuals generally are found concentrated in nonacademic, medical and health fields (Leslie, Kellans, & Gunne, 1982). At the community college, however, the part-time employee is the majority of the 200,000 instructional staff (NEA Almanac, 1987). A sample from one state is the result of a study of the Illinois community college system, where administrators revealed a high majority--seven out of ten--of the teaching faculty are part-time (Juravich, 1983). Moreover, whereas there has been a 9% growth nationally in full-time faculty members in the period 1972-77, there has been a 50% increase in the number of part-time faculty (AAUP Subcommittee, 1981), and some states, such as California, have put a legislative cap on the percentage allowable of part-time faculty. (By comparison, only 20% of employees in the non-educational world are part-time.) There are many reasons why part-timers choose to teach, and they include the desire to earn extra money, gain experience, and/or hope for a permanent position. The profile of the part-time instructor shows the individual is as likely to be female as male, younger or older than tenured faculty, is more likely to have a terminal, professional degree, and often has strong ties a to field outside of education (Kellans & Kyre, 1978).

Part-time faculty members increased 50% in the 1970's because of uncertain funding and enrollment trends, and because administrative codes that were written to govern the rights of part-timers were loosely worded (Parsons, 1980). As part of this lack of structure, successful challenges were made as to the permanency of part-time employees. As a consequence, to detail the rights of part-time, probationary, and permanent employees, the specific areas of status, compensation, and unit determination will be used to guide the discussion.

## Status

The status of an instructor in a public institution refers to the statutory or contractual classification of the employee of the institution. Encompassed in this concept is the principle of property rights and entitlement to benefits (Head & Kelley, 1978). In higher education, status has been the most frequently contested issue in the courts, and has, as a result, seen the greatest change in institutional and state regulations. One reason for the confusing history of the court cases is that these administrative codes and state statutes differ from institution to institution and state to state. The federal courts have acted in the First and Fourteenth Amendment realms if the wording of state codes governing policy is considered too broad or too vague (Kaplan, 1986). (Private schools are governed by specific institutional regulatory agreements, and instructors have different protections from public institutions, although even these institutions, however more autonomous, have nevertheless

been forced to come to terms with recent federal court rulings, especially as to segregation and racial bias in hiring and tenure.)

Fundamental to the property contract rights of faculty is the classification of the employee position--permanent, probationary, or temporary. The permanent employee is in the tenure track, and has a vested--or property--interest in his or her position, while the probationary employee is in the process of having the opportunity of becoming tenured. The temporary or part-time faculty member is not in a tenure-accruing position, and therefore is likely to have no property rights. It is estimated that at least 85% of part-time faculty thus are not eligible for tenure (Leslie et al, 1982).

The distinctions made between those who do and do not have property interest have not always been clearly stated, and the treatment or actions toward staff members has led to a variety of interpretations by judicial bodies. Throughout the United States there have been many suits brought against districts when regulations needed clarification. In the large California community college system, a major employer of part-time faculty members, there have been attempts to organize part-timers in the state and more clearly define their rights in the California Educational Code and in the local district contracts. Court cases from other states, such as Perry v. Sinderman (1972), Board of Regents v. Roth (1972), as well as the California case, Balen v. Peralta Junior College District (1974), were appealed to the

United States Supreme Court. Resulting rulings have created precedents to guide the handling of later suits in lower courts throughout the country. A discussion of the details of these cases and the resulting decisions follows, showing the importance of the wording of the law in each case and state, as to whether rights are clear or clouded.

In the Perry v. Sinderman (1972) decision, the court ruled that repeated hiring constituted the right of the teacher to force the college to grant a hearing for the individual if reinstatement did not occur. In this case, the court found for a Texas teacher hired on one-year contracts for the same assignment for a period of ten years. While employed, the professor was actively involved in public disagreements with the board of regents. He was dismissed after ten years without reason and without the opportunity for a hearing, thus being denied due process. The Court decision was that the teacher could challenge his lack of reinstatement as could probationary, tenure-track staff members because he was entitled to the same procedural rights (Gappa, 1978; Joyce, 1985). Hence, due process has been declared a property right for some part-time instructors based on treatment by the employer.

In contrast, in the case Board of Regents v. Roth (1972), the U.S. Supreme Court ruled in favor of the college in the suit of a one-year contract instructor who had been fired without reason or comment, saying that "to have a property interest in a benefit, a person clearly must have more than an abstract need or

desire for it. He must have more than a unilateral expectation for it. He must, instead, have a legitimate claim of entitlement" (Head, 1979; Texas Law Review, 1985). The respondent had been hired as an assistant professor at Wisconsin State University for a fixed term of one year. The issue addressed was whether the professor had the constitutional right for a statement of reasons and a hearing upon not being rehired. A Wisconsin state statute said all state university teachers would be employed for one-year terms and would be eligible for tenure only after four years of continuous service. The courts asserted that there was no stigma, charge, or disability imposed on the individual by not being rehired--he was not deprived of liberty. Property interests are created and defined by the terms of employment, using existing rules and understandings from state laws--not the federal Constitution [408 US]. It was clear in this case that the state law was sufficiently precise under the laws of contract.

The due process granted an employee may be accrued as a matter of law, policy, common practice, and/or acquiescence. The Roth case provided details of factors that control these above-mentioned accrual methods. The statutory language that excludes part-timers from participating and the waiving of claim to status exempts the right to due process. The latter was borne out in McLaughlin v. Tacoma Community College District (1975), when two college instructors accepted sabbatical replacement positions where the contract specified the waiving of tenure rights. When

the plaintiffs brought suit to test whether this contract should be enforced, the court supported the school district's action (Leslie et al, 1982; Kaplan, 1986).

The Balen v. Peralta Junior College (1974) case has had far-reaching implications. Balen had been a part-time instructor for four-and-a-half years at a San Francisco, California, bay area college, teaching the same course load semester after semester. He then participated in organizing the part-time faculty members into a collective bargaining unit and was shortly thereafter fired by the college without notice or opportunity for a hearing. Furthermore, the college had the policy of summarily dismissing all part-timers every year and then routinely rehiring these same part-timers. This practice was found by the California Supreme Court to have concomitant liability because it created an expectancy of reemployment (Leslie et al 1982). In reviewing the state case, the U.S. Supreme Court stated that Balen had attained probationary status under the California Educational code, section 1337.5, that governed the classification and rights of faculty members and, at the time Balen was hired, did not clearly distinguish between part-time and full-time faculty members, essentially meaning the two groups were to be treated with the same property rights. Balen therefore could be dismissed only for cause after notice and the opportunity for a hearing (Kaplan, 1986). The court emphasized the procedures of the college policy rather than what was written in the policy. As a result of this

case, the California educational code was rewritten, stating specifically that

> Any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee . . . employment of [part-time instructors] shall be limited . . . no person shall be so employed by any one district for more that two semesters or quarters within any period of three consecutive years . . . any person employed for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees shall be classified as a temporary employee and shall not become a probationary employee under the provisions of section 13446 [CA Educ. code 87482].

For those contemplating part-time employment at a college, these questions should be asked about policy previous to accepting a position:

1. Do state laws, administrative regulations, or institutional policy distinguish among categories of faculty that can and cannot expect job security--namely tenure?
2. Are rights to security reserved for a certain group and are the lines clearly drawn lines?

3. For what kind of work are part-timers employed, and do they differ in quantity and quality from the assignments of full-time staff members?
4. How many are long term part-timers, hired year after year to the same assignment?
5. Are departments granted wide latitude with part-timers, or do staff members observe the rules carefully?
6. Is it someone's administrative responsibility to monitor part-time employment (Leslie et al, 1982), and, if so, does he or she have expressed written board permission to use such authority? The questions related to part-time employee rights needs careful study by both employers and employees before contracts are offered or accepted (McCarthy, 1981).

In contrast to the usually precise time perimeters of a part-time contract employee, the issue of tenure is a broad concept and is different at each institution. National research has shown the criteria for permanent employment ranges from a general statement of acceptable performance over a period of specified years to a very specific checklist of tasks and time that must be completed before the awarding of tenure (Head & Kelley, 1978 ). An example of one institution's approach can be found at Oregon State University. It is stated in the Oregon State University Faculty Handbook (1978) that: "In general, promotions serve to recognize the level of professional achievement that a faculty member has demonstrated through his teaching, scholarship, and service" (OSU Faculty Handbook, 1978).

The recommendation authority at Oregon State rests with the tenure committee, not the department chair, as was emphasized in the case, Davis v. Oregon State University (1975). The plaintiff, an associate professor in Physics, asserted that the chair of the Physics Department told him he would receive tenure as a matter of course. In the two years where Davis came under review for tenure by the committee, the results were insufficient votes to either deny or grant tenure. Davis brought suit after his termination, but the courts ruled the department chair had no authority to grant tenure; therefore, Davis had no property interest.

Permanent faculty members are protected by the contracts the institution signs with the individual. Although this document can be brief or lengthy, the details are quite similar to the issues detailed for part-time employees. The due process rights of the tenured employee under the Fourteenth Amendment provide an orderly means for the relationship, and if the relationship is to end, the steps laid out in statutes, educational codes, and/or institutional guidelines need to be carefully followed in a proper sequence. A university may terminate tenure for cause if it has provided notice and opportunity for a hearing. Bowling v. Scott (1979) and Poterma V. Ping (1978) clarified this issue (Kaplan, 1986). In Bowling v. Scott (1979), the plaintiff filed suit after his tenure was terminated, but the court ruled that the University of Alabama had not denied due process as Bowling had been served a list of charges, been informed of formal

proceedings, attended 14 hearing sessions, and had been provided a report stating dismissal grounds (Kaplan, 1986). The Poterma v. Ping (1978) case was the due process test brought by a tenured economics professor who was dismissed at The Ohio State University. The courts ruled the written statement of reasons, notice of a hearing, the hearing itself where the professor submitted evidence on his behalf, and final dismissal statement had been sufficient to not infringe on the teacher's due process rights.

The reasons a tenured faculty member may be dismissed are for cause or financial exigency resulting in program discontinuation. Cause can include immoral conduct, embezzlement, incompetency, or insubordination. Financial exigency involves a proven financial hardship for an institution, where a department or program requires drastic, necessary reduction. The first major case in this area was AAUP v. Bloomfield College (1975). The courts involved in this case differed on the definition of financial exigency and the steps institutions should or could take to change this. The final opinions stated the burden of proof for financial exigency is on the institution, and tenure protects professors from dismissal if financial difficulties, cause, or age limitations do not exist.

The later landmark case, Krotkoff v. Goucher College (1975), defined financial exigency issues and procedures of nonrenewal of contracts in this situation. Krotkoff was a tenured, foreign language professor at a private liberal arts college. Her

appointment was terminated because the institution was experiencing long-term financial difficulties. The suit brought by the professor asserted that there was a breach of contract because financial exigency was not part of the termination of tenure guidelines specified in the contract she had with the school. The U.S. Court of Appeals held that the contract permitted termination due to financial exigency, that bona fide financial difficulties existed, and the institution had made reasonable efforts to provide alternative employment situations for Krotkoff.

It is clear, therefore, that a proper and legal process of termination of tenured faculty by administration requires orderly steps. These steps should include documentation of the problem from several sources, attempts to help the instructor improve or change, time to bring about improvement or change, sufficient notice (due process) and then a formal hearing after notice to air the issue (Carey, 1981).

## Compensation

The second area where litigation has occurred pertaining to the difference between part-time and full-time faculty is compensation. The issue is one of reasoning that pay and fringe benefits should be proportionately equal for part-time faculty. Title VII of the Civil Rights Act (1964) addresses the issue. It tolerates different standards of compensation, yet differential treatment must be justified. Colleges are required to keep employment records and file forms with the Equal Employment

Opportunity Commission to justify different pay rates (Leslie et al, 1982). Title IX of the Educational Amendment of 1972 addresses the equal employment opportunity for women but does not require equivalent or prorated pay for part-time employees (Leslie et al, 1982).

The case that is often cited in relation to equal compensation is Peralta AFT, Local 1603 v. Peralta Community College District (1975). In it, the same union that was involved in the Supreme Court case, Balen v. Peralta Community College District (1974), brought suit for equal pay for its part-time faculty members by having them reclassified as probationary employees. The court based its decision on a ruling made in the California Teachers Association v. Santa Monica Community College District (1978). In this case the court found the paragraphs of the California Education Code were clear and allowed for the continuing practice of part-time employment. In the Balen case, the court opinion expanded the previous ruling to state that the California Educational Code section, rewritten after previous litigation, was found to be specific enough to prevent reclassification of part-time instructors as probationary for those hired after the date of the changed code.

Suits that have their contention based on equal protection have been unsuccessful for three reasons. First, the courts have ruled that part-timers have been assigned fewer tasks and responsibilities than full-time faculty. Essentially, the work is not equal, so related compensations cannot be expected.

Second, part-timers have more limited preparation time for course instructions, and their teaching experience is generally less than full-time instructors. Finally, the institution hires part-time staff to keep its costs down, as it is not always possible to hire a permanent employee for every position. The courts have refused to prevent schools from losing this employment option (Kellans & Kyre, 1980).

## Unit Determination

The last area of litigation for part-time staff is unit determination. This involves a decision as to whether a group should be included or excluded from a collective bargaining unit. It is the principle of community of interest or similarities that leads to logical groups (Head & Kelley, 1978). The actions of various states have led to a tightening of definitions. For example, Connecticut divides faculty into collective bargaining units by work hours. Two-thirds of the states follow this process. Minimal rights are guaranteed, and as a result it is difficult to establish property rights for all groups (Head & Kelley, 1978).

The efforts to include part-timers in collective bargaining units have been more successful at the community college level than in four-year schools. For example, fewer than five four-year higher education institutions have separate bargaining units, while about 41% of the public sector community college collective bargaining units include some part-timers (Leslie et al, 1982). The right to bargain is covered by state statues of

public schools; the National Labor Relations Act (1947) provides for private institution problems. Research has shown that part-time faculty are often treated differently by administrators, and these same administrators do not want to incorporate part-timers in tenured faculty negotiations. It is unlikely that any changes in this situation will be supported by institutions (Kobesky, 1985).

## Summary

The number of faculty members in the United States is growing, and the fastest growing segment is that of the part-time instructor. All employees--part-time, probationary, and tenured faculty--have certain protections under the First and Fourteenth Amendments. However, there have been different interpretations of status, compensation, and unit determination, and recent court rulings on suits brought against institutions have been made to clarify many of these points. A positive effect of judicial action has been an improvement in the quality of educational codes and statutes so that the relationship between the institution and its employees is more clearly understood. Since the contractual reading of agreements between faculty and institutions can vary nationally, the individual who is contemplating part-time or tenure track employment should read and understand the contract and its accompanying regulations so later actions and expectations are anticipated. On the other side of the coin, the district hiring personnel should be aware of recent higher court cases affecting all types of employment

and know the state codes as they pertain to contracts. For those trying to use part-time employment as a means to gain access to full-time, tenure-track positions, a note of caution as to this outcome is in order, as institutions strive for tighter contracts and fewer financial obligations to part-time or temporary employees. Those cases that have been successfully brought against institutions have caused procedures and educational codes to be adjusted to avoid future litigation. At the same time, tenured faculty have been given clearer guidelines as to the circumstances that lead to continued employment or termination. The conclusion of this research into the rights of faculty is for all employees to be intelligent consumers. To understand the rules that govern one's livelihood is a time when one can never know too much.

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